Supreme Court, U.S.
FILED
DEC 14 1994
OFFICE OF THE CLERK

No. 94-692

In the Supreme Court of the United States

OCTOBER TERM, 1994

ERIC ANTONIO PARKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

THOMAS E. BOOTH
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether evidence of petitioner's prior drug offenses was properly admitted under Fed. R. Evid. 404(b).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 19 F.3d 638.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 1994. A petition for rehearing was denied on June 30, 1994. Pet. App. 1b-2b. The petition for a writ of certiorari was filed on September 28, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Florida, petitioner was convicted of conspiracy to traffic in cocaine, in violation of 21 U.S.C. 846, and possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Pet. App. 1c-2c. He was sentenced to life imprisonment. *Id.* at 3c. The court of appeals affirmed. *Id.* at 1a-6a.

1. Petitioner was charged with engaging in a conspiracy to traffic in crack cocaine with Carl Gray, Katrina Lymon, and others from November 1988 until February 1990, and with possessing crack cocaine between December 5 and December 10, 1988. The evidence at trial showed that petitioner, who was known as "E" or "Easy E," recruited women to transport cocaine to drug buyers. In December 1988, petitioner directed Lymon to deliver cocaine to two men in Tallahassee, Florida. On December 9, law enforcement agents arrested Lymon at the Atlanta, Georgia, airport and seized the cocaine. Lymon agreed to cooperate with the agents and to make a controlled delivery of the cocaine to its intended recipients. Lymon and an agent travelled to Tallahassee and rented a hotel room. Lymon called petitioner's beeper number and talked with him by telephone. Shortly afterwards, Gray and another man arrived at the hotel room to pick up the cocaine. The agent arrested the men and seized from Gray a piece of paper bearing the letter "E" and petitioner's beeper number. A search of Gray's car revealed rental documents for the car in petitioner's name. Gov't C.A. Br. 2, 3-7.

In March 1989, Lymon pleaded guilty to a drug offense. Although Lymon cooperated with the authorities, she concealed petitioner's identity from them. At Gray's

trial, Lymon falsely testified that the man who directed her to transport cocaine to Tallahassee was named "Jimbo." About four months after Gray's trial, Lymon revealed to authorities that petitioner was actually her source of cocaine. Later, Lymon told the authorities that in December 1988, she recruited Shirelle Merit to transport drugs for petitioner. Gov't C.A. Br. 4, 8-10.

2. Petitioner was first tried in May 1992 on one conspiracy count and two substantive drug counts. A jury acquitted him of one substantive drug charge, but was unable to reach a verdict on the remaining charges. Gov't C.A. Br. 2, 3.

In September 1992, petitioner was retried on the remaining two counts. Gov't C.A. Br. 3. At that trial, the government sought to present evidence of the following three prior drug offenses committed by petitioner. First, in January 1985, in Houston, Texas, petitioner was arrested after his car was stopped for a traffic violation and petitioner was found to be in possession of cocaine, marijuana, and a large amount of cash. Co-conspirator Gray was in the car with petitioner at the time. Pet. App. 5e-6e; Gov't C.A. Br. 11-12. Second, in August 1987, petitioner was again arrested in Houston after he negotiated the sale of crack cocaine with an undercover agent and directed the agent to the seller several yards away. After his arrest, petitioner was found to be in possession of marked currency used in the sale. Pet. App. 3e-5e; Gov't C.A. Br. 12. Third, in 1990, in Memphis, Tennessee, petitioner was arrested for drug trafficking and admitted to the police that he operated a drug scheme in which he recruited female couriers to fly cocaine to Memphis and to sell it in a nearby hotel. Pet. App. 16e; Gov't C.A. Br. 12-13.

The government contended that it was offering evidence of the Texas and Tennessee acts to show,

among other things, petitioner's intent, mode of operation, and plan. Pet. App. 16e-17e. Petitioner objected to the admission of the other acts evidence and offered to stipulate that if the jury found beyond a reasonable doubt that petitioner gave cocaine to Lymon and paid her to fly it to Tallahassee, that would establish his intent. *Id.* at 10e. The district court rejected petitioner's proposal on the ground that it did not remove the issue of petitioner's intent from the case.[1] *Id.* at 10e-14e. The district court admitted the other acts evidence under Fed. R. Evid. 404(b).

Finally, the prosecution also sought to introduce evidence that in December 1988, a man known as "E" directed Shirelle Merit to transport cocaine to a buyer in Charleston, South Carolina. The government contended that this act was part of the charged conspiracy, not other act evidence under Rule 404(b). The district court agreed that the South Carolina transaction was substantive evidence of the charged conspiracy and admitted it on that basis. Pet. App. 29e-30e.[2]

3. The court of appeals affirmed in a per curiam opinion. The court held that the district court did not abuse its discretion in admitting the other acts evidence. Pet. App. 2a n.1.

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[1] The court explained that petitioner's "after-the-fact stipulation" was "really no stipulation at all, you know, the ball game is over, and then you want to come in and agree to the score." Pet. App. 12e.

[2] The district court noted that the evidence also would be admissible under Rule 404(b) and that, if it were used for that purpose, the court would give a limiting instruction. Pet. App. 29e. Defense counsel never pursued that issue at trial, and the court never amended its ruling. Gov't C.A. Br. 22.

ARGUMENT

Petitioner contends (Pet. 7-28) that the district court erred in admitting the evidence of his other drug crimes. There is no merit to his claim.

1. Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Fed. R. Evid. 404(b). Such evidence "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Ibid.* In this case, petitioner's other drug crimes were not admitted to show his bad character, but to show his intent, his association with co-conspirator Gray, and his scheme.[3]

The evidence that petitioner was found with drugs and a large amount of cash in his pocket while driving in the same car as Gray tended to show that petitioner and Gray were co-conspirators in the drug trafficking charged in this case. See, *e.g.*, *United States* v. *Blakeney*, 942 F.2d 1001, 1017-1018 (6th Cir.) (bad act evidence admitted to show relationship between co-conspirators), cert. denied, 112 S. Ct. 646 (1991); *United States* v. *Legendre*, 657 F.2d 238, 242 (8th Cir.) (same), cert. denied, 454 U.S. 1037 (1981). Petitioner's admission to law enforcement agents that he used female couriers to fly into Memphis with drugs and to distribute them from nearby hotel rooms matched the pattern of the scheme in the charged offense and was admissible to

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[3] Contrary to petitioner's contention (Pet. 6, 28-30), evidence of Merit's trip to South Carolina to sell cocaine at petitioner's direction was admitted as an act that furthered the charged conspiracy, not as an other act under Rule 404(b). See Pet. App. 29e-30e; pp. 10-11, *infra*.

show petitioner's *modus operandi* and his intent to distribute drugs. See *United States* v. *Sanchez*, 988 F.2d 1384, 1393-1394 (5th Cir.) (other acts so similar to those charged as to "evince a signature quality" are admissible), cert. denied, 114 S. Ct. 217 (1993). Evidence that petitioner previously had been involved in selling drugs at the street level was admissible to show petitioner's intent in the instant case, notwithstanding the fact that the prior act involved a much smaller quantity of drugs. See *United States* v. *Hicks*, 798 F.2d 446, 451 (11th Cir. 1986) (evidence of street level cocaine sales admissible as proof of intent in prosecution for importing five pounds of cocaine), cert. denied, 479 U.S. 1035 (1987); see also *United States* v. *Stubbs*, 944 F.2d 828, 836 (11th Cir. 1991) ("[e]vidence of prior drug dealings is highly probative of intent to distribute a controlled substance, as well as involvement in a conspiracy") (internal quotation marks omitted).

Petitioner contends (Pet. 7-14) that because his defense was that he had nothing to do with the drugs at all, the government could not introduce other acts evidence to prove his intent. That contention is at odds with this Court's decision in *Estelle* v. *McGuire*, 112 S. Ct. 475 (1991). In *McGuire*, the Court rejected a due process challenge to the admission of evidence of "battered child syndrome," which had been offered to show that the death of a child resulted from intentional conduct. Like petitioner, the defendant in that case asserted that the evidence should not have been admitted because intent was not at issue. This Court rejected that contention, explaining that "the prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense." 112 S. Ct. at 481. The Court further noted that "[i]n the federal courts '[a]

simple plea of not guilty . . . puts the prosecution to its proof as to all elements of the crime charged.'" *Ibid.* (quoting *Mathews* v. *United States*, 485 U.S. 58, 64-65 (1988)). The Court concluded that "[t]he evidence of battered child syndrome was relevant to show intent, and nothing in the Due Process Clause * * * requires the State to refrain from introducing relevant evidence simply because the defense chooses not to contest the point." 112 S. Ct. at 481.

Consistent with the reasoning of *McGuire*, most courts of appeals have held that when a defendant pleads not guilty, and his intent is an element of the offense, the government can introduce other act evidence to meet its burden of proof on that element. See, *e.g.*, *United States* v. *Maxwell*, 34 F.3d 1006, 1009 (11th Cir. 1994); *United States* v. *Brown*, 34 F.3d 569, 573 (7th Cir. 1994); *United States* v. *Johnson*, 27 F.3d 1186, 1192 (6th Cir. 1994); *United States* v. *Jones*, 982 F.2d 380, 382 (9th Cir. 1992); *United States* v. *Miller*, 974 F.2d 953, 960 (8th Cir. 1992); *United States* v. *Parziale*, 947 F.2d 123, 129 (5th Cir. 1991), cert. denied, 112 S. Ct. 1499 (1992); *United States* v. *Harrison*, 942 F.2d 751, 760 (10th Cir. 1991). Because petitioner's intent was an element of both charges on which he was tried, the Eleventh Circuit correctly upheld the admission of other act evidence bearing on intent.[4]

Petitioner also relies (Pet. 14-22) on the principle, espoused by a number of courts of appeals, that other act

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[4] Petitioner errs in suggesting (Pet. 8-10) that review is warranted in this case to resolve a claimed circuit conflict on the circumstances in which a general denial puts intent in issue, thus rendering other acts evidence admissible. Petitioner identifies no circuit that holds that, in a specific intent crime such as this one, a general denial, standing alone, does not put intent in issue.

evidence is inadmissible to show intent when the defendant affirmatively removes intent as an issue from the case. In several cases, the Second Circuit has held that "a defendant may completely forestall the admission of other act evidence on the issue of intent" by clearly expressing a decision not to dispute intent. *United States* v. *Ortiz*, 857 F.2d 900, 903-904 (2d Cir. 1988), cert. denied, 489 U.S. 1070 (1989); see also *United States* v. *Colon*, 880 F.2d 650 (2d Cir. 1989). The Second Circuit's approach is stringent, however, and requires the defendant's statement to be of "sufficient clarity that the trial court [would] be justified * * * in charging the jury that if they find all the other elements established beyond a reasonable doubt, they can resolve the issue [of intent] against the defendant because it is not disputed." *United States* v. *Figueroa*, 618 F.2d 934, 942 (2d Cir. 1980). Other circuits have indicated that it may be improper to admit other act evidence if the defendant stipulates to the issue the prosecution seeks to prove with such evidence. See, *e.g.*, *United States* v. *Jemal*, 26 F.3d 1267, 1274 (3d Cir. 1994) ("to succeed, the defendant's proffer must be comprehensive and unreserved, completely eliminating the government's need to prove the point"); see also *United States* v. *Garcia*, 983 F.2d 1160, 1174 (1st Cir. 1993) (defendant's "concession must cover the necessary substantive ground to remove the issues from the case"; acceptance of stipulation remains in "sound discretion" of trial judge).

In this case, petitioner's proposed stipulation was insufficient to remove the issue of intent because it was a tautology. Petitioner stated only that if the jury found beyond a reasonable doubt that he gave cocaine to Lymon and paid her to fly it to Florida, then the jury could find that petitioner acted with intent to deliver. Pet. App.

10e. That stipulation "conceded" nothing: It merely stated that if the jury found facts sufficient to give rise to a strong inference of intent to distribute, then the jury could find that petitioner acted with intent. Such a proffer is not equivalent to conceding that the government need not prove petitioner's intent, or that the judge could instruct the jury to find intent to distribute if it found possession. See *Figueroa*, 618 F.2d at 942; see also *Colon*, 880 F.2d at 658 (rejecting similar stipulation); *United States* v. *Dynalectric Co.*, 859 F.2d 1559, 1581 (11th Cir. 1988) (same), cert. denied, 490 U.S. 1006 (1989).[5]

Finally, petitioner argues (Pet. 26-28) that the other acts evidence should have been excluded as unduly prejudicial under Fed. R. Evid. 403 because the evidence took up too much of the government's case. That argument is meritless. Rule 403 authorizes a district court to exclude relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice." Fed. R. Evid. 403. Here, the district court admitted just three other acts at trial; only six of the government's 15 witnesses testified as to petitioner's other acts, and the testimony of those six witnesses covers just 35 pages of trial transcript. Gov't C.A. Br.

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[5] Petitioner also argues (Pet. 22-26) that his proposed stipulation should have been weighed as a factor in balancing the probative value of the other act evidence against its prejudicial impact under Fed. R. Evid. 403, and that the circuits are in conflict over the importance of a proffered stipulation in applying Rule 403 to other act evidence. That issue is not raised by this case. Petitioner's proposed stipulation did not remove the issue of intent from the case; thus, petitioner is not assisted by decisions that consider such a stipulation to be a significant factor in applying Rule 403. See *Jemal*, 26 F.3d at 1274; *United States* v. *Hernandez*, 975 F.2d 1035, 1040 (4th Cir. 1992).

23-24 & nn.1 & 2. The other acts evidence did not thereby become the centerpiece of the trial, and the district court's admission of the evidence was not an abuse of discretion.[6]

2. Petitioner also argues (Pet. 28-30) that the district court erred in admitting Merit's testimony as substantive evidence of the conspiracy alleged in the indictment. The indictment specifically charged that the conspiracy occurred in the Northern District of Florida and "elsewhere," Pet. App. 1d; see *United States* v. *Medina*, 992 F.2d 573, 581 (6th Cir. 1993) (evidence of heroin delivery properly admitted as substantive evidence where indictment charged conspiracy to "distribute cocaine and other controlled substances") (emphasis omitted), cert. denied, 114 S. Ct. 1049 (1994); and many of the relevant indicia of a single conspiracy were present. Merit's act and the charged acts occurred in close temporal proximity; the parties overlapped; the conspirators had a common goal to sell cocaine; and the conspirators employed a common scheme in which petitioner recruited women to distribute cocaine in various cities in the South. See, *e.g.*, *Blumenthal* v. *United States*, 332 U.S. 539, 558 (1947) (finding single conspiracy among parties to a "larger common plan,"

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[6] Petitioner's reliance on *United States* v. *Yeagin*, 927 F.2d 798 (5th Cir. 1991), is misplaced. In *Yeagin*, the Fifth Circuit reversed the defendant's convictions where the district court had admitted at trial evidence of defendant's nine prior convictions, and where the government conceded that four of those convictions "were not necessary or relevant to any issue." *Id.* at 801. In this case, by contrast, the government introduced only three other acts, and each of those was relevant to and probative of a disputed issue. This case does not even approach the sort of "prior conviction overkill" condemned in *Yeagin*. *United States* v. *Ponce*, 8 F.3d 989, 994 (5th Cir. 1993).

who shared "knowledge of its essential features and broad scope * * * and * * * common single goal"); *United States* v. *Jones*, 913 F.2d 1552, 1561 (11th Cir. 1990) (factors supporting finding of single conspiracy are common goal, common scheme, and overlapping participants); *United States* v. *Marshall*, 985 F.2d 901, 907 (7th Cir.) (as long as common objective continues, "it remains a single conspiracy despite the fact that participants may change or perform different roles or functions at different times"), cert. denied, 113 S. Ct. 2445 (1993). The district court properly admitted Merit's testimony as substantive evidence of the charged conspiracy.

In any event, Merit's testimony was properly admitted under Rule 404(b) as evidence of petitioner's intent and *modus operandi*. The district court stated at the pretrial hearing that the evidence might "turn[] out" to be Rule 404(b) evidence and that if it did, the court would give a limiting instruction. Pet. App. 29e. Petitioner, however, failed to pursue the issue at trial; he neither requested a limiting instruction as to Merit's testimony nor objected when such an instruction was not given. See *United States* v. *Olano*, 113 S. Ct. 1770, 1776 (1993) (issues not raised below are reviewed for plain error). The district court did not commit plain error in failing to give a limiting instruction as to Merit's testimony.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

THOMAS E. BOOTH
Attorney

DECEMBER 1994